85-1923

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

RIENK KAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID R. HINDEN
ANTHONY MICHAEL GLASSMAN
GLASSMAN & BROWNING, INC.
360 N. Bedford Drive
Suite 204
Beverly Hills, CA 90210
(213) 278-5100

Attorneys for Petitioner

7 PP

QUESTION FOR REVIEW

Whether there was a violation of an incarcerated, pro se defendant's rights under the Speedy Trial Act when the court ordered a four-month continuance of the trial date over defendant's objection and after all parties had announced that they were ready for trial.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTION	4
STATUTORY PROVISIONS	5
BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT	5
STATEMENT OF THE CASE	5
REASONS TO GRANT PETITION	8
CONCLUSION	23
APPENDIX	
Opinion of Court of Appeals	24
Denial of Petition for Rehearing	60
Findings and Judgment of District Court	61
Relevant Statutory Provisions	64

TABLE OF AUTHORITIES

Case	Page
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	9,14,15
United States v. Martin, 742 F.2d 512 (9th Cir. 1984)	21
United States v. Perez-Revelez, 715 F.2d 1348 (9th Cir. 1984)	15,16,20

OPINIONS BELOW

The United States District Court for the Central District of California filed its unreported Finding and Judgment on January 21, 1985. The Judgment is reproduced in the Appendix at pages 61 to 63.

The Court of Appeals for the Ninth Circuit vacated the judgment and remanded the case to the District Court. Its opinion is reported at 781 f.2d 1380 (9th Cir. 1986) and reproduced in the Appendix herein at pages 24 to 59.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1985. A petition for rehearing was filed on February 18, 1986 and was denied on March 12, 1986. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions, 18 U.S.C. §§3161(c)(1) and (h)(8)(A) and (B) and 18 U.S.C. §3162(2), are set forth in the Appendix at pages 64 to 69.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

The basis for federal jurisdiction in the court of first instance is 18 U.S.C. §3231.

STATEMENT OF THE CASE

On September 21, 1983, a grand jury in the Central District of California returned a first superseding indictment against Rienk Kamer, the Petitioner herein, charging him with conspiracy, mail fraud, wire fraud and

foreign transportation of money taken by fraud.

On October 11, 1983, Mr. Kamer, a citizen of The Netherlands, was arrested in Belgian territory upon a warrant issued in connection with the first superseding indictment. Mr. Kamer remained in Belgian custody for almost ten months pending extradition on the American warrant. He was extradited from Belgium and arrived in Los Angeles on July 8, 1984 where he was arraigned on July 10, 1984.

Bail initially was set at $5,000,000 and subsequently reduced to $2,500,000. Mr. Kamer was unable to meet this bail and remained incarcerated throughout the proceedings.

The trial initially was set for September 18, 1984. On July 19, 1984, a Deputy Public Defender was appointed to represent Mr. Kamer. On August 23, 1984,

the Deputy Public Defender made an application for a continuance and notified the court that the request was being made over Mr. Kamer's objection.

On September 11, 1984, the court continued the trial date until January 8, 1985. Mr. Kamer thereupon made a motion to represent himself, and the motion was granted on September 25. The Deputy Public Defender who previously had represented Mr. Kamer was appointed standby counsel on the same date.

On September 24, 25 and 27, Mr. Kamer made various motions attempting to advance his trial date. These motions were denied.

On December 11, 1984, Mr. Kamer and the government entered into a written plea agreement. The court accepted the disposition, Mr. Kamer entered his plea, and he was sentenced on January 21, 1985.

The Ninth Circuit Court of Appeals reversed the conviction because the District

Court failed to comply with Rule 11, F.R.Cr.P. and because the sentence violated the plea agreement. The Court of Appeals rejected Petitioner's claim that the indictment should be dismissed for failure to comply with the Speedy Trial Act.

REASONS TO GRANT PETITION

This case presents the question of whether an incarcerated, pro se defendant's desire to proceed to trial may be overridden "for his own good." At the time of his extradition to the United States, Mr. Kamer had been in a Belgian jail for almost ten months on the American extradition warrant. He elected to represent himself because his appointed attorney was not prepared to go to trial. Nevertheless, over Mr. Kamer's objections and after all other counsel had announced ready for trial, he was compelled to spend an additional six months in custody in a foreign country awaiting trial.

The issue in statutory terms is whether the trial court had any basis for ordering an "ends of justice continuance" pursuant to 18 U.S.C. §3161(h)(8)(A); however, this case requires consideration of that statutory provision within the context of the right of self-representation recognized in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Mr. Kamer was arraigned in the United States on July 10, 1984 and the trial date was initially set for September 18, 1984. A Deputy Public Defender was appointed to represent him on July 19. On August 23 appointed counsel moved for a continuance because of his work load and the complexity of the case. In that application, Mr. Kamer's attorney notified the court that: "Mr. Kamer informed me that he was not prepared to waive his right to a trial within the time requirements of the Speedy Trial Act as long as he was in custody."

At a hearing on August 29, Mr. Kamer's appointed counsel reiterated his request for a four or five-month continuance. The following colloquy ensued:

> "[Public Defender] There is another concern, however. Mr. Kamer did not wish to waive his right to a speedy trial.
>
> "[The Court] Well, it's his case, isn't it?
>
> "[Public Defender] That's correct, your Honor. And it's my position, however, that if he wishes a September 18th date, I could not properly prepare the case, and I would be inclined to request that I be relieved from the case, your Honor."

Following a discussion wherein Mr. Kamer made clear his insistence upon a speedy trial and his desire to represent himself, the following exchange occurred:

"[The Court] Is it your feeling, today, as you stand here today, that you want to try the case on the 18th of September?

"[Mr. Kamer] That's correct."

At the August 29 hearing, the government's position was that "there has to be a continuance" "to ensure Mr. Kamer gets a fair trial . . . whether he wants it or not." The issue was left unresolved and another hearing was set for September 6.

On September 5, Mr. Kamer filed a declaration which set forth in detail the basis of his desire that the case proceed to trial as scheduled on September 18. On September 18, the Court ordered the trial continued until January 8, 1985 based upon the following findings regarding excludable time:

"(1) The case is unusual and complex due to the nature of the prosecution so that it is unreasonable to expect

adequate preparation for the trial within the time limit applicable (18 U.S.C. 3161(h)(8)(A)(ii); and (2) even if the case was not so unusual and complex the denial of the request for continuance would deny counsel for defendant RIENK KAMER the reasonable time necessary for effective preparation taking into the exercise of due diligence (18 U.S.C. 3161(h)(8)(A)-(iv))."

On September 12, 24 and 27, Mr. Kamer filed motions seeking to assert his speedy trial rights. On September 24, Mr. Kamer also filed a "written consent" pursuant to 18 U.S.C. 3161(c)(2) to commence trial in less than 30 days. In the September 27 motion, defendant formally withdrew the application for a continuance filed by his former attorney, stating that the application had been filed against his will, and reasserted his desire to proceed to trial without delay.

As of September 27, the attorneys representing the Government and Mr. Kamer's co-defendant, Whitney, had announced their readiness to proceed to trial.[1/] Thus, the issue is whether the "ends of justice" required the continuance until January 8 notwithstanding everyone's professed readiness to proceed and the defendant's vigorous -- indeed almost desperate -- pleas for the trial to commence.

In the absence of a request by any party for a continuance due to the complexity of the case, such complexity is no basis for denying defendant a speedy trial. A pro se defendant's decision in

---

1/ On September 6, Mr. Whitney's attorney advised the court that he was ready to go to trial. On September 25, the prosecutor advised the Court that the government was ready "to start trial tomorrow."

such matters is entitled to as much respect as a similar tactical decision by counsel.

Once a defendant has been appointed to represent himself, there is no basis for the court to override the defendant's lawful decisions about the conduct of his defense. Any other conclusion would eviscerate the right of self-representation recognized in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975):

> "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is

not inconceivable that in some rare instances, the defendant might in face present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"

In United States v. Perez-Revelez, 715 F.2d 1348 (9th Cir. 1984), the court made the following observations about an "ends of justice" continuance:

"'The ends of justice' exclusion was included in the Act 'in response to the concern that courts needs discretion to respond to characteristics of individual cases similar to those granted automatic exclusion'. U.S. v. Nance, 666 F.2d 353, 355 (9th Cir.), cert.-denied, 456 U.S. 918, 102 S.Ct. 1776, 72 L.Ed.2d 179 (1982). However, the discretion granted to the trial court to invoke the ends of justice exception is narrow. 'Realizing that broad discretion would undermine the mandatory time limits of the Act', Congress intended that the ends of justice continuance be 'rarely used.' Id., at 1355.'"

In the instant case, the only factual bases that would justify the continuance were the statements by Mr. Kamer's attorney that he needed additional time for

preparation. The need for preparation by Mr. Kamer's attorney ceased being a factor no later than September 25 when Mr. Kamer, who by then formally represented himself, expressed his readiness and desire to proceed without delay.

In its opinion, the Court of Appeals concluded that "preparation of [Kamer's] appointed counsel did not cease being a factor on September 25" because such counsel was retained by the court as standby counsel. [Original emphasis.] In fact, the trial court denied Mr. Kamer's motion to accelerate the trial date before it appointed the Deputy Public Defender as standby counsel. Moreover, the following exchange at the September 25 hearing made it clear that the Deputy Public Defender required the January 8 trial date only if he remained attorney of record:

"THE COURT: Do you have anything else to say about the date of trial?

THE DEFENDANT: My respect is a speedy trial.

THE COURT: What is the trial date? It's in January, is it not, the 8th?

THE DEFENDANT: Correct.

THE COURT: Mr. Landin, do you have anything to add to that?

MR. LANDIN: Only that the January 8 date would be the date, I think, I would need if I was still the attorney of record."

The duties which the Public Defender's Office agreed to assume as standby counsel were entirely ministerial in nature and limited to:

"a. Being available, at reasonable times and upon reasonable notice, for discussions with him aimed at informing him of upcoming filing dates and courtroom protocol and procedure;

b. Providing, upon request, sample

motions, briefs and memoranda for review by him to act as a model or format for the actual motion which will be prepared by him;

c. Attending discovery or status conferences with the Assistant United States Attorney prosecuting the case;

d. Being present at all court hearings to explain the order of proceedings;

e. Attending the actual trial of the matter at counsel table;

f. Assisting with photocopying and filing of motions;

g. Assisting him in filing applications for investigative or expert services under the Criminal Justice Act."

Under the standby counsel arrangement Mr. Kamer had full responsibility for:

"a. Drafting and typing of all motions;

b. Making all legal arguments to the Court;

c. Investigation of all facts in support of his proposed defense;

d. Direct and cross-examination of witnesses (advisory counsel will perform direct examination of defendant, if necessary);

e. The presentation of opening statements and closing arguments to the judge or jury."

To suggest that the "ends of justice" continuance could be granted over Mr. Kamer's objection to permit preparation by standby counsel in connection with these limited services would ignore the narrow construction of the "ends of justice" exclusion properly required by United States v. Perez-Revelez, 715 F.2d 1348, 1355 (9th Cir. 1984).

Once the reason for a continuance ceases to exist, the speedy trial clock

begins to run again. United States v. Martin, 742 F.2d 512 (9th Cir. 1984).

The remedy for violation of the 70-day period from arraignment to trial while a defendant is in custody is that "the indictment shall be dismissed on motion of the defendant." 18 U.S.C. §3162.

The motion for dismissal for lack of speedy trial was filed on November 30, 1984. The time period from arraignment on July 10, 1984 through the filing date of such motion was 142 days. As set forth below, excluding all intervening dates during which any motions were pending or which otherwise might be excludable, there elapsed at least ninety-five nonexcludable days prior to the Speedy Trial Act motion on November 30:

Date	Description	Excludable Days
7/10-7/13/84	Arraignment and Notice of Bail Hearing through Bail Hearing (1)	4
7/19/84	Bail Hearing (2)	1
7/20/84	Appearance of New Attorney	1

8/8/84	Bail Hearing (3)	1
8/23/84 9/27/84	Application for Continuance, Bail Hearing (4), Trial Date Hearing, Bail Hearing (5), Waiver of Counsel, Speedy Trial Motion, Motion for Translator	36
10/12- 10/15/84	File Bail Motion and Hearing (6) Thereon	4
		47

Because the basis for the Order of Continuance (i.e., requested time for preparation in view of complexity of case) ceased to exist when Mr. Kamer assumed his own representation and reasserted his desire to proceed without delay, there was absolutely no basis for the "ends of justice" continuance ordered by the court. To permit a continuance for these reasons over a pro se defendant's objections, i.e., to compel him to spend an additional four months in jail so he presumably may address the complexities of his case, turns the Speedy Trial Act into a hollow promise and places a heavy and unwarranted burden upon the right of self-representation.

CONCLUSION

Based upon the foregoing points and authorities, it is respectfully submitted that this petition for writ of certiorari should be granted.

DATED: May 9, 1986

GLASSMAN & BROWNING
Incorporated

By David R. Hinden
DAVID R. HINDEN
ANTHONY MICHAEL GLASSMAN
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 85-5013
	)	D.C. No.
Plaintiff-Appellee,	)	83-0626-RG
	)	
vs.	)	OPINION
	)	
RIENK KAMER,	)	Filed
	)	February 5, 1986
Defendant-Appellant.	)	
	)	

Before SNEED, NELSON and NORRIS, Circuit Judges.

NELSON, Circuit Judge:

Defendant Rienk Kamer was charged with 57 counts of conspiracy, mail fraud, and wire fraud, in violation of 18 U.S.C. sections 371, 1341, and 1343, respectively. Pursuant to a binding plea agreement with the government, Kamer withdrew his plea of not guilty and pled guilty to three counts. Kamer appeals to this court contending that the judgment must be vacated because (1) his guilty plea violated Rule 11 of the Federal Rules of Criminal Procedure in that the trial court failed to

(a) ascertain whether the plea was voluntary, (b) establish the factual basis for the plea, and (c) inform Kamer of the nature of the charges against him; and because (2) his sentence did not comply with the terms of the plea agreement. Alternatively, and yet interrelated, Kamer argues that the indictment should be dismissed for failure to comply with the Speedy Trial Act because there was no basis for excludable time for trial preparation.

We vacate the district court's judgment with respect to each of Kamer's Rule 11 claims; we hold similarly with respect to his contention that his sentence did not conform to the plea agreement. We affirm, however, the district court's judgment that there was not a violation of the Speedy Trial Act.

///

///

///

///

BACKGROUND

On October 26, 1983, a federal grand jury charged Kamer, a citizen of the Netherlands, and an American co-defendant, Bernard Whitney, with 57 counts of conspiracy, mail fraud, and wire fraud, in violation of sections 371, 1341, and 1343 of Title 18 of the United States Code. The indictment alleged that Kamer and Whitney jointly owned and operated entities which sold American land at greatly inflated prices to European investors. Apparently, it was not disclosed to investors that the land was inappropriate for large-scale development and that Whitney and Kamer lacked the expertise and financing to insure development. In fact, Kamer and Whitney made no effort to develop the properties, and the prices charged for the land were such that it was highly unlikely that any of the investors could ever make a profit. Investors were also misled about potential sources of financing for the projects and about placement of their money in trust accounts. As a result of this scheme,

investors lost millions of dollars.

After extradition from Europe, Kamer was arraigned on July 10, 1984. Trial was set for Sepgember 18, 1984, but on August 23, 1984, despite Kamer's objections, his appointed Deputy Public Defender made an application for, and was granted, a continuance of trial until January 8, 1985. Kamer thereafter made a motion to represent himself, and the motion was granted on September 25, 1984. The Deputy Public Defender, however, was appointed standby counsel.

On December 11, 1984, Kamer, acting pro se, entered into a binding plea agreement whereby Kamer agreed to plead guilty to three counts. In return, Kamer would receive a maximum sentence of three years with full credit for time already served.

The trial court accepted the plea and on January 21, 1985, sentenced Kamer to sixteen months in custody with credit for time served. The trial court also imposed a five-year probationary sentence on the condition that

Kamer make restitution and that he re-enter the United States only with the approval of the Attorney General.

ISSUES PRESENTED

I. Did the trial court violate Rule 11 by failing to (A) ascertain whether the plea was voluntary, (B) establish the factual basis for the plea, or (C) inform defendant of the nature of the charges against him?

II. Did the sentence comply with the plea agreement?

III. Should the indictment be dismissed for failure to comply with the Speedy Trial Act?

DISCUSSION

I. THE GUILTY PLEA: RULE 11

A. Failure to inform as to the nature of the charges and penalties: Rule 11(c)(1)

Section (c)(1) of Rule 11 provides, in pertinent part:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court

and inform him of, and determine that he understands. . .:

(1) the nature of the charge to which the plea is offered. . . .

The government maintains that Kamer's "over-technical" focus on the plea proceeding ingores the overall effort made by the court throughout the entire criminal proceedings. The government argues that a thorough examination of the entire record reveals compliance with the mandates of Rule 11(c)(1). We disagree; the trial court's inquiry was wholly inadequate and thus does not comply with Rule 11.

One of the purposes of Rule 11 is to develop a complete record at the plea proceeding so as to decrease the number and facilitate the disposition of often frivolous post-conviction attacks. McCarthy, 394 U.S. 459 at 465, 89 S.Ct. 1166 at 1170, 22 L.Ed.2d 418 at 424 (1969). As the McCarthy Court noted, "[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's under-

standing of the nature of the charge against him." Id. at 470, 89 S.Ct. at 1172 (emphasis in original). The dictates of Rule 11 and the federal policy of fair and efficient judicial administration require that the reviewing court look solely to the record of the plea proceeding. United States v. Coronado, 554 F.2d 166, 170 n. 5 (5th Cir. 1977) ("[C]laims of noncompliance with rule 11 must be resolved solely on the basis of the rule 11 transcript. That transcript provides all that is needed and all that is allowed for the resolution of such claims."); Fed.R.Crim.P. 11(h) advisory committee note (1983 Amendment) (same). See also United States v. Dayton, 604 F.2d 931, 939 (5th Cir. 1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980) ("it will be a rare case and one that we cannot presently envision in which we look beyond the transcript of the arraignment in passing on an appeal after a guilty plea.") The requirement that the trial judge adequately inquire of the defendant,

at the plea proceeding, as to the nature of the charge effectuates the purposes of Rule 11 and the policy of efficient judicial administration. The government's contention that this court should review the entire record, therefore, is baseless.

In his prepared pre-sentencing statement to the court, Kamer declared in conclusory fashion that he violated several sections of the United States Code. Kamer's statement, however, does not indicate that he, in fact, understood the charges to which he pled. Nevertheless, the trial judge discussed with Kamer the nature of the charges only to the extent of the following colloquy:

> THE COURT: You understand the nature of the charges here against you, I think, very thoroughly, because the statement you just made demonstrates that. You don't have any questions about what the nature of the charges are?
>
> DEFENDANT KAMER: After fourteen months, no more.

Clearly, the sufficiency of any particular colloquy between the judge and the defendant as to the nature of the charges will "vary from case to case, depending on the peculiar facts of each situation, looking to both the complexity of the charges and the personal characteristics of the defendant, such as his age, education, intelligence, the alacrity of his responses, and also whether he is represented by counsel." United States v. Wetterlin, 583 F.2d 346, 351 (7th Cir. 1978), cert. denied, 439 U.S. 1127, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979). In the instant case, the district court judge neither caused the indictment to be read, see United States v. Punch, 709 F.2d 889, 892-94 (5th Cir. 1983) (in non-complex cases, a reading of the indictment may suffice); Dayton, 604 F.2d at 938 (same); nor did he give any explanation as to the nature of the charges to which the plea was offered. See Wetterlin, 583 F.2d at 350-52; Irizarry v. United States, 508 F.2d 960, 965-55 (2nd Cir. 1974) (trial judge should at least set out the bare bones

elements of the offense). See also McCarthy, 394 U.S. at 467 n. 20, 89 S.Ct. at 1171 n. 20.

In Wetterlin, the Seventh Circuit vacated a guilty plea to a complex conspiracy charge for failure to ascertain whether the defendant understood the nature of the charges. Similar to the case sub judice, the Court of Appeals observed that "the judge made no effort to explain the law of conspiracy generally or by reference to the specific charge of this case, nor did he personally inquire and determine that the defendant understood the nature of the charges." 583 F.2d at 350 (footnote omitted).

Granted, Kamer exhibited above-average intelligence. As the trial judge noted, however, this was a complex case. And, although there was standby counsel, Kamer essentially represented himself. That Kamer did not fully appreciate the nature of the charge against him is reflected in his conclusory and somewhat contradictory prepared statement to the court. Indeed, the statement tends to evidence a misunderstanding of the alleged offenses

and their requisite elements. The charged offenses all require a showing of specific intent. See United v. Clevenger, 733 F.2d 1356, 1358 (9th Cir. 1984); United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980). Nonetheless, reading from his declaration to the court, Kamer stated that he was advised that United States law was not applicable to his activities and that mail fraud and wire fraud are unknown to the Netherlands. These remakrs, coupled with Kamer's conclusory admission to criminal nondisclosure "because of [his] culpable ignorance of the necessity of disclosing information of that sort," should have alerted the judge to the fact that Kamer may not have pled guilty with a full awareness of the nature of the charges. See McCarthy, 394 U.S. at 470, 89 S.Ct. at 1172; Punch, 709 F.2d at 893-94.

It is incumbent upon a district judge accepting a plea to make the minor investment of time and effort necessary to set

forth the meaning of the charges and to demonstrate on the record that the defendant understands. "There is no excuse for failing to undertake procedures of such utility in ensuring voluntary and intelligent pleas that are susceptible to meaningful review." Coronado, 554 F.2d at 172. Under the circumstances, the trial judge should not have accepted Kamer's plea until his understanding was manifest. A district court should not rely upon a pro se defendant's bald representation that he does not have any questions. Rather, the trial judge is required to engage in a colloquy with the defendant and elicit responses from him which demonstrate, on the record, that the accused does so understand. Accordingly, we agree with the Wetterlin court that

> the judge should not have assumed that the defendant already knew and understood what the charges were, but rather the court should have assumed he was ignorant of the

> charges and thus used the hearing to inform the defendant "of some aspects of legal argot and other legal concepts that are esoteric to an accused."

583 F.2d at 350 (quoting Coronado, 554 F.2d at 172. See also, McCarthy, 394 U.S. at 467, 89 S.Ct. at 1171 (Rule 11 is not followed when, instead of personally inquiring of the defendant, the district judge resorts to "assumptions" as to the defendant's understanding).[1/]

1/ This case is distinguishable from the situation that was presented in United States v. Coronado, 554 F.2d 166 (5th Cir. 1977). Although admonishing the trial judge for "fail[ing] sufficiently to make the required explication of the charges," the Coronado court found no reversible error because the Rule 11 transcript, "as a whole," made clear that Coronado had the requisite understanding. 554 F.2d at 173. On the present transcript, however, with the exception of Kamer's prepared presentencing statement (which, as we previously stated, demonstrates a lack of understanding), there is nothing which this court can review to discern substantial compliance with Rule 11(c)(1). We conclude, therefore, that the error here is not harmless.

B. Failure to inquire as to voluntariness: Rule 11(d)

Section (d) of Rule 11 provides that "the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force of threats or of promises apart from a plea agreement."

The government asserts that after weeks of vigorous negotiations with Kamer, all of

---

1/ con't.

> There would not be harmless error under subdivision (h) where, for example, as in McCarthy, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty.

Fed.R.Crim.P. 11(h) advisroy committee note (1983 Amendment) (first emphasis added; second emphasis in original).

which were summarized and memorialized on the record, the trial judge had a sufficient basis for finding that Kamer's plea was entered voluntarily and free from any sort of influence. This contention, however, is legally unfounded. Although the trial judge may have satisfied himself that Kamer's plea was indeed voluntary, Rule 11 "expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily. . . ." Fed.R.Crim.P. 11, Notes of Advisory Committee on Rules, 1966 Amendment. "[T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." McCarthy, 394 U.S. at 465, 89 S.Ct. at 1170 (emphasis added).

The transcript of the plea proceeding is absolutely devoid of any inquiry. As discussed in Section I.A, supra by developing a complete and searching record, the

trial court can, and should, ensure the thorough and effective administration of justice. Evidently, the trial judge found Kamer's plea to have been made voluntarily. On the bare record before us, however, we cannot adequately perform a review of the district judge's determination. When, as here, we are unable to establish, beyond doubt, that the defendant voluntarily entered his plea, we have no choice but to find noncompliance with Rule 11(d).[2/]

2/ If it is elsewhere evidenced, a trial judge's failure to demonstrate on the Rule 11 transcript that a defendant's plea was voluntary may be harmless error. See Fed.R.Crim.P. 11(h). Here, however, we cannot discern voluntariness from even the entire record. Therefore, we need not decide that issue now.

///

///

///

///

///

C. Failure to establish a factual basis for the plea: Rule 11(f)

Kamer's alleged violation of sections 371, 1341, and 1343 all derive from a failure to disclose material facts. See United States v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979), cert. denied, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). Kamer argues that the plea must be vacated because the court did not make "such inquiry as shall satisfy it that there is a factual basis for the plea." Fed.Crim.P. 11(f). Specifically, he alleges that there was insufficient evidence of intent to defraud, a requisite element of the offenses to which he pled guilty. See United States v. Clevenger, 733 F.2d 1356, 1358 (9th Cir. 1984); United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980).

In McCarthy, the Supreme Court observed, Rule 11(f) requires the court accepting the plea of guilty to make an "examination of the relation between the law and the acts

the defendant admits having committed, a task designed to expose the defendant's state of mind on the record through personal interrogation. . . ." McCarthy, 394 U.S. at 467, 89 S.Ct. at 1171).

As noted in I.A., supra Kamer was apparently under the impression that U.S. law was not applicable to his activities. Moreover, he expressed that the offenses involved herein are unknown to his country, "[a]nd for that reason, [Kamer] was unaware of the possibility of such a violation." These statements, uncontroverted by the government, tend to negate a showing of the requisite scienter.

Kamer's alleged violation of sections 371, 1341 and 1343 all derive from a failure to disclose material facts. See Mandel, 591 F.2d at 1363. Absent a duty to speak, however, nondisclosure does not rise to criminal proportions. See id. at 1362-63. Kamer's statements indicate that he was advised he owed no such duty. His

failure to disclose, therefore, may not have been motivated by an intent to deceive. From the present record, "we cannot infer that [Kamer] had, beyond doubt, the specific intent to defraud." United States v. McDonald, 576 F.2d 1350, 1359 (9th Cir.), cert. denied sub nom. Stewart v. United States, 439 U.S. 830, 99 S.Ct. 105, 58 L.Ed.2d 124 and cert. denied sub nom. Bresbis v. United States, 439 U.S. 927, 99 S.Ct. 312, 58 L.Ed.2d 320 (1978). Accordingly, we hold that the court below failed to comply with Rule 11(f).

II. THE SENTENCE: COMPLIANCE WITH PLEA AGREEMENT

Kamer entered his guilty plea pursuant to a written plea agreement conditioned upon acceptance by the court in conformance with Rule 11(e)(1)(A) and (C). The written plea agreement provided that Kamer would enter a guilty plea to counts 1, 2, and 21 of the indictment, and in return, "[t]he

maximum sentence imposed by the Court shall be three (3) years or less, with full credit for time served since October 11, 1983." On December 11, 1984, the court accepted the agreement. When sentenced on January 21, 1985, however, Kamer received 16 months imprisonment with credit for time served and was placed on probation for five years. The court further imposed as conditions of probation that Kamer "make restitution as ordered by the probation office or the court," that he not re-enter the United States "without the permission of the Attorney General or an authorized agent thereof," and that he "report to the nearest probation office within forty-eight hours" of re-entry. Kamer complains that the sentence imposed fails to comply with the terms of the agreement.

Plea agreements are subject to contract-law standards of interpretation. United States v. Arnett, 628 F.2d 1162, 1164

(9th Cir. 1979). As this court previously stated:

> In determining whether a plea agreement has been broken, courts look to "what was 'reasonably understood by [the defendant] when he entered his plea of guilty.'" United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979) (quoting United States v. Crusco, 536 F.2d 21, 27 (3d Cir. 1976)). If disputed, the terms of the agreement will be determined by objective standards.

United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984). In order to determine whther the sentence imposed comports with the reasonable understanding and expectations of the defendant as to the sentence for which he had bargained, we look to the objective proof on the record.

As previously mentioned, the written plea agreement refers to a "maximum sentence" of three years or less, but is

silent as to any probationary term. The government argues that imposition of the probationary term did not breach the plea agreement because Kamer's only desire was to avoid incarceration of more than three years. See Gammarano v. United States, 732 F.2d 273, 276 (2d Cir. 1984). The government further contends that the probationary term should stand even if probation exceeded Kamer's expectations. Essentially, the government asserts that the plea agreement was silent on this issue because probation is not part of a "sentence." Therefore, it claims that Kamer unreasonably concluded that probation could not be imposed.

The government contends that Gammarano supports its claim that Kamer intended only to avoid incarceration. Gammarano, however, is distinguishable on its facts. Determining the "reasonable understanding and expectations of the parties," the Gammarano court looked to counsel's argument at the

sentencing hearing and Gammarano's reaction immediately after the sentence had been imposed. 732 F.2d at 276. The court stressed the fact that counsel had "argued eloquently in favor of a noncustodial term," that Gammarano and his counsel thanked the court after sentencing, and that he did not immediately file a direct appeal. Id. The Second Circuit interpreted Gammarano's behavior as objective "evidence that his reasonable expectations [that he would not be incarcerated for more than two years] had been fulfilled." Id.

By contrast, Kamer filed a notice of appeal immediately after the sentence was imposed. Also unlike Gammarano, nowhere in the record is there any reference by anyone to a noncustodial term prior to actual sentencing. See 732 F.2d at 276. Finally, while the record does not indicate that Kamer objected at the time sentence was imposed, he was acting as his own counsel and may not have believed that oral objection was appropriate at the time.

See id. Accordingly, Kamer appears reasonably justified in expecting the sentence to comply with the "literal terms of the agreement." Travis, 735 F.2d at 1132.

There appears to be a split in the circuits regarding the government's contention that probation is not a "sentence,".[3/]

3/ Compare Sims v. United States, 607 F.2d 757, 759 (6th Cir. 1979) (imposition of five-year prison term upon revocation of probation for two years is not double jeopardy because defendant "had not been sentenced"); United States v. Becker, 536 F.2d 471, 473 (1st Cir. 1976) ("probation and sentence are separate and distinct"); United States v. Fultz, 482 F.2d 1, 4 (8th Cir. 1973) ("Probation . . . is in no sense a sentence as that term is used in the [Probation] Act") with United States v. Condit, 621 F.2d 1096, 1098 (10th Cir. 1980) ("for purposes of 28 U.S.C. §2255 and 18 U.S.C. §3653 . . . probation is merely one form of sentence"); United States v. Rodgers, 588 F.2d 651, 654 (8th Cir. 1978) ("probation is a sentence within the meaning of 18 U.S.C. §3653"); Nicholas v. United States, 527 F.2d 1160, 1162 (9th Cir. 1976) ("probation is a 'sentence' within the meaning of section 3653"); Napoles v. United States, 536 F.2d 722, 725 (7th Cir. 1976) ("probation is a sentence within the meaning of the provisions of §2255 and §3653"); Smith v. United States, 505 F.2d 893, 895 (6th Cir. 1974) ("probation is a sentence like any other sentence").

However, we find Judge Wisdom's analysis in Smith v. United States, 505 F.2d 893 (5th Cir.1974), instructive. Writing for the Fifth Circuit, he explained: "In determining whether probation is properly defined as a 'sentence,' we avoid needless terminological distinctions of artificial origin; we focus on the reality of probationary status." 505 F.2d at 895. We similarly urge that antiquated semantic distinctions be laid aside. "Probation and similar dispositions are, and should be viewed as, sentences just like any other disposition following conviction,... Probation is an attempt by society to impose a sanction that will accomplish its goals, just as any other sentence is." III A.B.A., Standards for Ciminal Justice 18.80 (1980). We are of the opinion that within the plea bargaining context, where the reasonable understanding and expectations of the parties prevail, probation is commonly understood to be a sentence.

Our conclusion that probation is a sentence within the plea bargaining context is further supported by the Second Circuit's holding in United States v. Burruezo, 704 F.2d 33 (2d Cir.1983). The defendant in Burruezo entered into a plea agreement with the government. The government agreed that "any prison sentences imposed on [the] pleas of guilty shall not exceed ten years." Id. at 34. At sentencing the trial court imposed "imprisonment for eight years with a consecutive five-year term of probation, $3,000 in fines, and a requirement that [defendant] make restitution." Id. at 35. The Second Circuit vacated the district court's judgment, however, observing that "the court did not follow the sentencing limitations incorporated in the plea arrangement: the sentence imposed was materially different from the terms of the agreement because the possible length of sentence exceeded ten years (including the period of probation...." Id. at 38.

It is not uncommon for probation to be one of the considered elements of a plea bargain. Thus, failure to expressly provide for a probationary term must be construed as an intentional omission designed to preclude its imposition.

Burruezo additionally suggests that the district court's imposition of restriction likewise amounts to a breach of the plea agreement. There, the appellate court found that "the comparative magnitude of the amount of restitution [$400,500] ... created a material change in the plea bargain." 704 F.2d at 38 (quoting United States v. Runck, 601 F.2d 968, 970 (8th Cir.1979), cert. denied, 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980). In Runck, the district court judge imposed as a condition of probation restitution of $87,400. The Runck court reversed because, as in Burruezo and the instant case, the plea agreement was silent on the issue of restitution:

> While the condition of restitution of a small amount might be acceptable because it would not necessarily materially alter the expectations of the parties to the bargain, restitution of a large amount should have been part of the plea bargain or the possibility of its inclusion as a condition or probation made known and agreed to by the bargainers.

601 F.2d at 970.

Here, the written plea agreement fails to mention restitution. Nonetheless, the government urges that throughout the negotiations Kamer was aware of the possibility of its imposition. The record, however, indicates to the contrary; several times the court seemed to indicate that restitution would not be ordered.[4/] Fur-

---

4/ At one point the court told Kamer that "it's not likely that there would be material financial conditions attached to whatever happens here, okay?"

ther, subsequent to signing the plea agreement Kamer told the judge it was his understanding that no restitution would be imposed.

Restitution, here, is presumably in the millions. Under the circumstances, we agree that "[i]f restitution of less than $90,000 [in Runck] is material enough to demand express inclusion in a plea agreement, it follows ineluctably that restitution of some [one million-plus] must likewise be included." United States v. Garcia, 698 F.2d 31, 36 (1st Cir.1983) (restitution in amount of $900,000 is material alteration of plea agreement).

With respect to the court's imposition of re-entry restrictions, the government maintains there is no material variance with the plea agreement since Kamer would already be subject to such restrictions as a general matter of law. The government, however, appears only partially

correct. Present law enables the Attorney General to exclude aliens who have been convicted of crimes involving moral turpitude. 8 U.S.C. §1182(a)(9) (1970 & 1985 Supp.). Moreover, Kamer's offense would be considered a crime of moral turpitude within the meaning of section 1182. See McNaughton v. Immigration and Naturalization Service, 612 F.2d 457 (9th Cir.1980)(fraud is a crime involving moral turpitude).

Accordingly, ordering Kamer "not to enter the United States without the permission of the Attorney General or an authorized agent thereof" merely subjects Kamer to conditions he has already required to obey. The imposition of this restriction, therefore, is harmless error.

As to the requirement that Kamer report to a probation office within 48 hours of re-entry, however, the government cites no authority for the proposition that Kamer would have been required to do

so absent the court's imposition of sentence. In light of the express language of the agreement and Kamer's expectations that probation would not be imposed at all, we find this additional requirement to be a material breach of the bargain.

Since we agree with Kamer that the plea agreement was breached, we vacate the judgment. Santobello v. New York, 404 U.S. 257, 262-63, 92 S.Ct. 495, 498-99, 30 L.Ed.2d 427 (1971).

III. SPEEDY TRIAL ACT

Kamer complains that the district court erred in entering an "ends of justice" continuance pursuant to 18 U.S.C. §3161(h)(8)(A). 5/ Kamer's trial was

---

5/ Section 3161(h)(8)(A) of Title 18 provides, in pertinent part:

> No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its

originally scheduled for September 18, 1984. On August 23, 1984, however, Kamer's court-appointed attorney moved for a four-to-five month continuance. Counsel indicated to the court on August 29 that Kamer wanted to go to trial as scheduled, but said that if the court did not grant a continuance, counsel would be forced to withdraw because of inadequate trial preparation. The government agreed that in order to insure a fair trial, a continuance should be granted. On September 11, 1984, pursuant to a section 3161(h)(8)(A) hearing, the district court found that (1) the complexity of the case required additional time for trial preparation and (2) even if the case was not complex, Kamer's counsel needed additional

---

5/ con't.

> reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

time for trial preparation. Kamer does not challenge these findings, and, moreover, they do not appear to be clearly erroneous. See United States v. Perez-Reveles, 715 F.2d 1348, 1351 n. 2 (9th Cir. 1983) (findings that ends of justice require continuance reviewed for clear error). Rather, Kamer argues that on September 25, 1984, when his motion for self-representation was granted, his appointed counsel's need of additional time for trial preparation ceased being a factor. Accordingly, he concludes that the period between September 25, 1984, and January 18, 1985, was not properly excludable, and, therefore, a Speedy Trial Act violation occurred. Kamer fails to note, however, that although the district court granted Kamer's motion for self-representation, the trial judge retained the appointed Deputy Public Defender as standby counsel. Contrary to Kamer's assertion, therefore,

preparation of his appointed counsel did not cease being a factor on September 25.

As the district judge observed, the case was a complex one. There were numerous overseas documents, most of which are in the Dutch language. And, of the more than 70 witnesses, many reside in Europe. Accordingly, we are of the opinion that the trial court's grant of an "ends of justice" continuance pursuant to 18 U.S.C. §3161(h)(8)(A) was within its discretion, and, therefore, no Speedy Trial Act violation occurred.

CONCLUSION

We agree with Kamer that the district court did not comply with several of Rule 11's requirements, and, thus, the judgment should be vacated. Similarly, we hold the plea agreement to have been breached and therefore vacate the judgment on this independent ground. Finally, we find no Speedy Trial Act violation and thus decline to dismiss the indictment.

Accordingly, we vacate the judgment and remand the cause to the district court for proceedings consistent with our above holdings.

SNEED, Circuit Judge, concurring separately:

I concur in Judge Nelson's opinion. I do this while harboring the belief that the appellant has represented himself in this prosecution considerably better than he would have been served by most attorneys. That belief provides no basis for affirmance, however.

Rule 11 imposes upon trial courts fairly precise formal requirements designed to reduce the opportunities for misunderstanding on the part of the defendant or the court. The price that must be paid for this benefit is an occasional reversal solely on the basis of failure to conform to the formalities. This is the usual price that must be paid if formalities are

to be taken seriously, as in the instance of Rule 11 they should be. Not to pay the price leads to forfeiture of the benefits that the formalities were intended to achieve.

Formalism in the last century or so has had harsher critics than it deserved. It is reassuring to see its beneficent aspects be recognized in a setting in which that recognition is bolstered by our more honored concern for those accused of crime.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 85-5013
	)	D.C. No.
Plaintiff-Appellee,	)	83-0626-RG
	)	
vs.	)	ORDER
	)	
RIENK KAMER,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: SNEED, NELSON and NORRIS, Circuit Judges.

Upon due consideration, Appellant's Petition for Rehearing is DENIED.

FILED March 12, 1986

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. RIENK KAMER, Defendant.	NO. 83-0626-RG JUDGMENT AND PROBATION/ COMMITMENT ORDER

Defendant has been convicted as charged of the offense(s) of conspiracy in violation of Title 18 United States Code Section 371 as charged in count one of the Second Superseding Indictment, mail fraud in violation of Title 18 United States Code Section 1341 as charged in count two of the Second Superseding Indictment and wire fraud in violation of Title 18 United States Code Section 1343 as charged in count twenty-one of the Second Superseding Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to

the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of sixteen months with credit for time served setting a release date of February 11, 1985 on Count One of the Second Superseding Indictment.

IT IS ADJUDGED that on Count Two and Count Twenty-one imposition of the sentence is suspended and the defendant is placed on probation for a period of five years on the following conditions: 1) defendant is to comply with the rules and regulations of the probation office and with the provisions of General Order 225, 2) defendant is to make restitution as ordered by the probation office or the Court, 3) defendant is not to enter the United States without the permission of the Attorney General or an authorized agent thereof, 4) defendant is to strictly fulfill the plea agreement, specifically to return to

the Netherlands within seventy-two hours of his release on February 11, 1985, 5) if defendant re-enters the United States he is to report to the nearest probation office within forty-eight hours.

IT IS ORDERED that the underlying indictments and the remaining counts of the Second Superseding Indictment are dismissed on the Government's motion.

FILED: January 21, 1985

_____
Richard Gadbois
United States District Judge

RELEVANT STATUTORY PROVISIONS

The following portions of 18 U.S.C. Section 3161 ("The Speedy Trial Act") are relevant to this Petition for Certiorari:

18 U.S.C. §3161(c)(1):

(c) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. §3161(h)(8)(A) and (B):

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons

for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay

in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. §3162(2):

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere

shall constitute a waiver of the right to dismissal under this section.

PROOF OF SERVICE

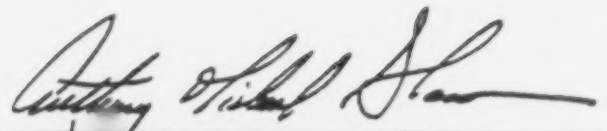
I, ANTHONY MICHAEL GLASSMAN, am a member of the Bar of the Supreme Court of the United States and am a senior partner in the firm of Glassman & Browning, Incorporated. My partner, David R. Hinden, is counsel of record for Petitioner Rienk Kamer.

I hereby certify that on the 12th day of May, 1986, I served one copy of the Petition for Writ of Certiorari as follows:

1. On the United States, by mailing one copy in a duly addressed envelope, with first-class postage prepaid to The Solicitor General, Department of Justice, Washington, D.C. 20530.

It is further certified that all parties required to be served have been

served, and that the list of such parties is as set forth above.



ANTHONY MICHAEL GLASSMAN
GLASSMAN & BROWNING,
INCORPORATED
360 North Bedford Drive
Suite 204
Beverly Hills, CA 90210